RECORD AND BRIEFS

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No. 15-118

In the Supreme Court of the United States

JESUS C. HERNÁNDEZ, ET AL.,
Petitioners,

v.

JESUS MESA, JR.,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

As a general rule, if a U.S. border guard standing on U.S. soil shoots and kills an unarmed teenager at close range, there is no doubt that the Fourth Amendment's prohibition on unjustified deadly force applies, and that the judiciary may review the constitutionality of the officer's conduct.

The question here is whether everything changes because the victim turned out to have been a Mexican citizen who, seconds before he was shot, had crossed the border into Mexico. That is, are courts still able to review the lawfulness of an officer's conduct in these circumstances? Or will the Executive instead be handed unchecked power to determine the legality of its own use of deadly force against noncitizens at the border?

The government argues for the latter. It asks this Court to hold that the Constitution's prohibition on unjustified deadly force does not apply. And it contends that, either way, there is no avenue for judicial review. In pressing these arguments, the government asserts that national-security interests, immigration activities, and foreign relations would be threatened by constitutional adjudication. Yet the government does not identify any such concerns raised specifically by *this* case.

This Court's "precedents, old and new, make clear that concerns of national security and foreign relations do not warrant abdication of the judicial role." *Holder v. Humanitarian Law Project*, 561 U.S. 1, 34 (2010). That is all the more true here. If this Court were to side with the government, it would effectively turn the border into an on/off switch for fundamental constitutional protection. That would "permit a striking anomaly in our tripartite system," conferring power on "the President, not this Court, [to] say 'what the law is.'" *Boumediene v. Bush*, 553 U.S. 723, 764-65 (2008).

I. The Fourth Amendment's prohibition on the unjustified use of deadly force applies to a close-range, cross-border shooting by a U.S. agent standing on U.S. soil.

As our opening brief explains (at 15), this Court has made clear that "questions of extraterritoriality turn on objective factors and practical concerns, not formalism." *Boumediene*, 553 U.S. at 764. That "century-old approach" asks whether extraterritorial application of a particular constitutional provision, in a particular context, would be "impracticable and anomalous." *Id.* at 759-60. *Boumediene* specifically emphasized that this functional "extraterritoriality test" has been "appl[ied]" even "in the Fourth Amendment context." *Id.* at 760. Concurring in *United States v. Verdugo-Urquidez*, Justice Kennedy applied the test and concluded that practical concerns dictate that "the Fourth Amendment's warrant requirement should not apply in Mexico as it does in this country." 494 U.S. 259, 278 (1990).

The first question in this case is whether a *different* provision of the Fourth Amendment—its prohibition on unjustified deadly force—applies when a border guard standing on U.S. soil shoots an unarmed Mexican citizen at close range, just across the border.[1] In answering no, the respondents do not dispute this Court's traditional functionalist approach or Justice Kennedy's application of it in *Verdugo-Urquidez*. Nor do they make much effort to show why applying protection here would be impracticable or anomalous. Instead, they offer two

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[1] Although the government asserts (at 13) that "[t]he availability of a *Bivens* remedy is 'antecedent' to" the other two questions, this Court has not provided an order of battle in this context. The question whether the Constitution applies at all is logically prior to the question whether, *if* it applies, there is a remedy.

reasons in support of their formalistic territorial rule. The first is that (in their view) *Verdugo-Urquidez* entirely "forecloses" any unjustified-deadly-force claim. U.S. Br. 11, 33, 37-38; *see* Mesa Br. 4, 6. The second is that, even if *Verdugo-Urquidez* does not control, "objective factors and practical concerns" would cut against constitutional protection here. U.S. Br. 43-48; *see* Mesa Br. 14-16. Neither is persuasive.

A. The government first argues (at 33) that *Verdugo-Urquidez* "forecloses" any possibility that the Fourth Amendment applies here. The government relies almost entirely on the sentence in Justice Kennedy's concurrence stating that he "d[id] not believe" that his views "depart[ed] in fundamental respects from the opinion of the Court, which [he] join[ed]" (thus providing the fifth vote). *Id.* at 275. But, as the government later concedes (at 38), Justice Kennedy expressly disagreed with the plurality's formalistic reliance on the Fourth Amendment's reference to "the people." *Id.* at 276-77. Eschewing formalism, he instead applied the "impracticable and anomalous" test drawn from Justice Harlan's concurring opinion in *Reid v. Covert*, 354 U.S. 1, 75-76 (1957). And the pragmatic concerns he identified were specific to the warrant requirement. *Verdugo-Urquidez*, 474 U.S. at 278 ("The conditions and considerations of this case would make adherence to the Fourth Amendment's warrant requirement impracticable and anomalous.").

In light of Justice Kennedy's concurrence and the Court's later decision in *Boumediene*, *Verdugo-Urquidez* does not foreclose the possibility that another part of the Fourth Amendment might, in narrow circumstances, apply to noncitizens beyond the border. And although the government disagrees, it does not deny the core point: an expansive reading of *Verdugo-Urquidez*—formalistically extending its holding to a case with radically different facts, involving a different constitutional

provision—is inconsistent with the Court's traditional functionalist approach.

Contrary to the government's assertions, therefore, we are not arguing that "*Boumediene* implicitly overruled *Verdugo-Urquidez*," or that "*Verdugo-Urquidez* is no longer good law." U.S. Br. 11, 39. Our position, rather, is that *Boumediene* correctly articulated the "common thread uniting" this Court's extraterritoriality cases (including *Verdugo-Urquidez*): their shared recognition that functionalism, not formalism, guides the way. Even if some cases could arguably be read to suggest that constitutional protection for noncitizens necessarily stops where "*de jure* sovereignty" ends, the Court in *Boumediene* refused to read its cases "to conflict in this manner." 553 U.S. at 764. It should do the same here. Reading *Verdugo* to sweep in constitutional provisions other than the warrant requirement—without first asking the critical question whether extraterritorial application of those provisions would be impracticable and anomalous—would mark a stark departure from this longstanding approach.

B. Under the correct approach, the inquiry "turn[s] on" what it always has: "objective factors and practical concerns." *Id.* The Court in *Boumediene*, drawing on Justice Kennedy's concurrence in *Verdugo-Urquidez* and Justice Harlan's concurrence in *Reid*, emphasized that a key question is whether extraterritorial application would be "impracticable and anomalous." *Id.* at 759-60.

On this question, the respondents have almost nothing to say. Agent Mesa makes no attempt to explain what is impracticable or anomalous about ensuring that border guards, in carrying out their law-enforcement duties on U.S. soil, adhere to uniform constraints on the use of deadly force. And the government does not pick up the slack: It does not deny that protection would

apply if Sergio were a U.S. citizen, or had been standing on the U.S. side of the border, or had significant connections to the United States. The government does not articulate why it would be impracticable or anomalous for border guards to heed the same constitutional constraints in the circumstances presented here.

Instead, the government takes a different tack. It claims that affording constitutional protection here would "itself be 'impracticable and anomalous" because it would create "uncertainty" about the Fourth Amendment's application "to military and intelligence activities abroad." U.S. Br. 44. Put differently, the government is *not* arguing that applying constitutional protection in a close-range, cross-border shooting would in any way be impracticable or anomalous. Rather, the government is arguing that it would be *in other contexts*, and that this is reason enough to deny protection here.

This is an argument against the Court's functionalist approach itself. Indeed, all three points the government advances for why a functionalist test would yield the same result as a formalist one are riffs on this same point: the government's belief that there is no limiting principle to extraterritorial application of the unjustified-deadly-force prohibition. The government argues that the geographic region (the border zone) is "ill-defined" rather than "categorical." U.S. Br. 42-43. It claims that "uncertainty" surrounding extraterritoriality would "cast a cloud" on "military and intelligence activities" and border security. U.S. Br. 44-46. And it insists that our position "is not actually limited to the border area." U.S. Br. 46-48.

These same arguments are often made in opposing extraterritorial application of a constitutional provision. *See, e.g.*, *Boumediene*, 555 U.S. at 842 (Scalia, J., dissenting) (criticizing "the Court's 'functional" test" as "un-

workable in practice" because it "does not (and never will) provide clear guidance for the future"); *cf. Hamdi v. Rumsfeld*, 542 U.S. 507, 535 (2004) (plurality op.) (rejecting government's argument that applying basic due-process protections would be "unworkable and inappropriate in the enemy-combatant setting"). Experience has shown, however, that these administrability concerns have not materialized. *Boumediene* did not purport to resolve a host of difficult questions about its scope. And the Insular Cases did not provide a comprehensive list of which rights are deemed "fundamental" and thus applicable in American territories. *Balzac v. Porto Rico*, 258 U.S. 298, 312-13 (1922). Yet the federal courts have proved up to the task of drawing lines in these (and many other) contexts, and will do so again here. *See, e.g.*, *Tuaua v. United States*, 788 F.3d 300, 307-09 (D.C. Cir. 2015) (holding that birthright citizenship is not "fundamental" under the Insular Cases); *Al Maqaleh v. Gates*, 605 F.3d 84, 94-99 (D.C. Cir. 2010) (holding that Suspension Clause does not apply at Bagram under *Boumediene*'s functionalist approach).

In any event, the government's line-drawing concerns are overstated. Although it raises the specter of a "global," "all-encompassing view of the Fourth Amendment," rejected by this Court in *Verdugo-Urquidez*, 494 U.S. at 268-69, we are not seeking to resurrect that view here. Our theory is far narrower: that the prohibition on unjustified deadly force applies at (and just across) the border, at least when a law-enforcement officer on U.S. soil fires his weapon at close range.

Once that is understood, the government's concerns fall by the wayside. The government speculates, for example (at 45-46), that a ruling for petitioners would imperil intelligence gathering and "searche[s]" of noncitizens beyond the border. Not in the least. *Verdugo-Urquidez* squarely holds that the government may con-

duct warrantless searches and seizures of property of noncitizens abroad because of the practical problems inherent in getting a warrant. *See* 494 U.S. at 278 (Kennedy, J.). That holding applies equally to government surveillance and "thermal imaging systems" in northern Mexico. U.S. Br. 46.

The government also floats the possibility that a ruling in our favor would result in applying constitutional protection to victims of drone strikes and other deadly military operations in far-off corners of the earth. *Id.* at 47. That concern is misplaced. Although the U.S. often exercises hard power near its military bases and installations abroad, the practical concerns with applying constitutional protections to military operations "aris[ing] halfway around the globe," *Verdugo-Urquidez*, 494 U.S. at 275, are worlds apart from those presented here. Domestic law-enforcement officers, including border guards, operate under constitutional constraints on the use of deadly force every day. That is the norm. The opposite is true in the military context. Having judges review combat decisions on the other side of the world (even those implemented from a command center inside the U.S.) is different in kind than ensuring uniform compliance with a fundamental constitutional norm by domestic law enforcement on the border.

Finally, the government challenges the workability of a functional, context-specific approach even as to the immediate border area. *See* U.S. Br. 45-46. These concerns are no barrier to extraterritorial application either. As our opening brief explains (at 26), federal courts have extensive experience crafting and applying rules in Fourth Amendment cases that look to a variety of factors to determine the scope of constitutional protection. *See, e.g.*, *United States v. Dunn*, 480 U.S. 294, 301 (1987) (curtilage doctrine). And the Fourth Amendment's substantive reasonableness standard is flexible enough to

address any unique concerns that may arise in the cross-border context. In other border-related cases, for example, courts look not only to the formal border itself but to its "functional equivalents," and they make judgments about just what that encompasses. *See Almeida-Sanchez v. United States*, 413 U.S. 266, 272-73 (1973); *United States v. Martinez-Fuerte*, 428 U.S. 543, 550 (1976).

Courts can do the same here. If domestic law-enforcement officers continue to fire their guns across the border, resulting in the loss of civilian life, then it is difficult to imagine what is so harmful—or more to the point, so impracticable or anomalous—about ensuring that their conduct comports with basic constitutional norms. This does not rule out case-specific reasons for declining to apply protection in certain circumstances. Nor does it mean that there will be a constitutional violation in every case. It simply ensures that courts are able to play their traditional role as a check on unlawful government conduct.

On the respondents' view, however, "the only check on unlawful conduct would be that which the Executive Branch provides"—either through extradition, criminal proceedings, or internal discipline. App. 87a-88a. None of those hypothetical enforcement mechanisms, however, has thus far proved capable of addressing the problem. This Court's cases point to a different approach: "in our tripartite system of government," it is the Judiciary's role to serve as a check on the Executive Branch—not the Executive's prerogative to serve as a check on itself. *Boumediene*, 553 U.S. at 765.

II. Agent Mesa is not entitled to qualified immunity.

On qualified immunity, the government agrees that the answer to the question presented is no: immunity may not be granted or denied based on facts unknown to the officer at the time of the incident. *See* U.S. Br. 51.

Yet that is exactly what the court of appeals did. It relied on facts unknown to Agent Mesa at the time of the shooting (Sergio's nationality, ties to the U.S., and precise physical location) in holding that Mesa is entitled to immunity. *See* App. 5a. Even Mesa agrees (at 20) that Sergio's later-discovered "citizenship status is irrelevant for purposes of qualified immunity protection in this case." For that reason alone, this Court should reverse.

With later-discovered facts off the table, there is no basis for granting qualified immunity here. A border guard who uses unjustified deadly force while in the U.S. violates the Constitution under longstanding, clearly established law. The complaint alleges that Sergio was playing a game with friends in the culvert and had no interest in entering the United States. Pet. App. 146a. It then describes how Mesa shot Sergio after Sergio "retreated" under the bridge, where he stood "defenseless" with "no weapon," not "threatening Mesa, or any third party." Pet. App. 142a, 146-47a. It has been clearly established for decades that "seiz[ing] an unarmed, nondangerous suspect by shooting him dead" is unconstitutional. *Tennessee v. Garner*, 471 U.S. 1, 11 (1985). Mesa does not argue otherwise.

Instead, he rests his qualified-immunity defense (at 18-20) on an alternative account of the facts that is wholly without support in the record. But defendants may not obtain a dismissal based on facts outside the complaint. *See* Fed. R. Civ. P. 12(b)(6), (d). At the motion-to-dismiss stage, the question is whether the complaint "alleges the commission of acts that violated clearly established law." *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985). It does.

For its part, the government—having conceded the answer to the question presented—takes up the fight as to whether Mesa is entitled to immunity based on the specific allegations made here. But the government

cannot carry Mesa's burden for him. Although the government tries to shift the burden onto the petitioners to *disprove* immunity, *see* U.S. Br. 49-50, "qualified immunity is an affirmative defense" that must be pleaded and proved by "the defendant." *Crawford-El v. Britton*, 523 U.S. 574, 587 (1998). As this case comes to the Court, Mesa has utterly failed to carry his burden.

Nor does the government make up for the shortcomings in Mesa's defense anyway. It agrees that *Garner* and other cases clearly establish constitutional prohibition against excessive lethal force "as a general matter," but maintains (at 52-53) that they are distinguishable because they "involved individuals in the United States." The government likewise argues (at 50 n.18) that, given *Verdugo-Urquidez*, Mesa could not have known that shooting Sergio was unlawful. But again: "Because this case concerns the defense of qualified immunity, ... the Court considers only the facts that were *knowable* to the defendant officers," which do not include Sergio's nationality, ties to the U.S., or precise physical location—facts ascertained only after the incident. *White v. Pauly*, 137 S. Ct. 548, 550 (2017) (per curiam) (emphasis added).

The government's proposed analysis, moreover, is generalized even further away from this case. The government contends (at 52) that Mesa is entitled to immunity because he shot "a person of unknown nationality" whom he had "no reason to believe is a U.S. citizen." But no border guard would reasonably believe that he may use lethal force against an unarmed, unthreatening person of *unknown* nationality just because that person might be a noncitizen without substantial ties to the U.S. The government's argument also rests on "far too general a [description] to control" the qualified-immunity

analysis here, and barely resembles what occurred in this case.[2] *City & County of San Francisco v. Sheehan*, 135 S. Ct. 1765, 1775 (2015). A trained border guard should know that the culvert where the shooting took place is a shared, interconnected area between the U.S. and Mexico, where thousands of people—U.S. and Mexican citizens alike—cross the border daily. *See generally* Br. of Border Scholars. He should also know that children playing in the culvert could be citizens of either country. *Id.* The mere chance that a child is *not* a U.S. citizen does not shield a border guard from liability when he chooses to use unjustified lethal force while standing on U.S. soil.

A contrary rule would mean that border guards would almost always be entitled to immunity because they rarely can know someone's nationality (and U.S. ties) beforehand. Indeed, the upshot of the government's position, which it buries in a footnote (at 53 n.20), is that Mesa would be immune from liability even if Sergio were a *U.S.* citizen. There, too, Sergio would have been "of unknown nationality" at the time of the incident, and Mesa would have had "no reason to believe" he was a U.S. citizen. That cannot be right.

Nor is Mesa entitled to qualified immunity under the government's rewritten question presented—whether Mesa's intentional shooting of an unarmed teenager violated a "clearly established substantive-due-process right under the Fifth Amendment." U.S. Br. (I); BIO (I); *cf. Bray v. Alexandria Women's Health Clinic*, 506 U.S.

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[2] The government's proposed qualified-immunity standard is also incorrect. *Verdugo-Urquidez* held that the Fourth Amendment also protects persons with "significant voluntary connections" to the United States. 494 U.S. at 271. Agent Mesa did not know Sergio lacked such connections when he shot him.

263, 280 (1993) ("[I]t is the petition for certiorari (not the brief in opposition and later briefs) that determines the questions presented."). The government takes a stray quote from *Mullenix v. Luna*, 136 S. Ct. 305 (2015), to mean that a plaintiff must identify a decision that both clearly establishes the plaintiff's right and locates that right in the precise constitutional provision on which the plaintiff relies. U.S. Br. 50. *Mullenix* did no such thing. "[T]he proper inquiry is whether the *right* itself—rather than its *source*—is clearly established." *Russo v. City of Bridgeport*, 479 F.3d 196, 212 (2d Cir. 2007). And for good reason: If an officer is on notice that his actions are unlawful, no further notice is needed. Additionally, because the Fourth and Fifth Amendments are incorporated against the States under the Fourteenth Amendment, the government's position would mean that a decision holding a *federal* officer liable under the Fourth Amendment would not clearly establish that a *state* officer's identical actions were equally unconstitutional under the Fourteenth Amendment.

In any case, Mesa's actions clearly violated the Fifth Amendment—whose protections have already been interpreted to apply abroad. *See Reid v. Covert*, 354 U.S. 1 (1957). It "shocks the conscience," *Rochin v. California*, 342 U.S. 165, 172-73 (1952), to point and shoot at an unarmed child who is retreating and attempting to hide.

III. No special factors militate against recognition of a damages remedy for a border patrol agent's unlawful killing on the border.

That leaves one question: If constitutional protection applies and qualified immunity does not, is the Executive's domestic conduct nevertheless immunized from judicial review? The answer is no.

Justice Harlan explained in *Bivens* that it would be "anomalous to conclude that the federal judiciary" is

"powerless to accord a damages remedy to vindicate social policies which, by virtue of their inclusion in the Constitution, are aimed predominantly at restraining the Government as an instrument of the popular will." *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388, 403-04 (1971) (Harlan, J., concurring in the judgment). Yet the respondents urge precisely this anomalous result.

The respondents recognize that, without *Bivens*, the Hernández family would be left with "nothing" to remedy their son's unlawful killing and little to deter similarly unlawful conduct in the future. *Id.* at 409-10. In the government's view, however, that result is justified because "Congress, not the Judiciary, is the appropriate body to decide whether ... to provide monetary remedies," U.S. Br. 18, and because some other, hypothetical border-related cases *could*, in the future, implicate special factors of national security and international diplomacy—though there is no harm to either interest here. That argument conflates this case with challenges to executive *policies* on immigration, diplomacy, or national security. Here, we seek merely to enforce a constitutional rule that constrains rogue officers and is already part of the Executive's national-security and diplomacy policy: border guards cannot shoot innocent children. Without a *Bivens* action, that right becomes "merely precatory." *Davis v. Passman*, 442 U.S. 228, 242 (1979).

A. The government first attacks *Bivens* itself, characterizing the doctrine as a historical blemish since limited by this Court. U.S. Br. 15. But even as the Court has declined to extend *Bivens*, "it has never—outside of the unique military context—left an aggrieved family with 'nothing.'" Pet. Br. 48. The Court's decision not to recognize *additional* implied causes of actions for constitutional violations where Congress, state tort law, or other remedies suffice does not diminish the important back-

stop that *Bivens* provides in the separation of powers. Pet. Br. 37-38. Where no other remedies exist, a *Bivens* action is the only means to ensure "the vindication of constitutional interests such as those embraced by the Fourth Amendment," as well as the rule of law. *Bivens*, 403 U.S. at 407 (Harlan, J. concurring in the judgment).

Damages claims for constitutional violations, just like claims for injunctive relief, have a longstanding history. As the government recognizes, "[t]he ability to sue to enjoin unconstitutional actions by state and federal officers ... reflects a long history of judicial review of illegal executive action, tracing back to England," and is based entirely upon judge-made remedies. *Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1384 (2015); *see also Bivens*, 403 U.S. at 404 (Harlan, J., concurring). The government's contention that "[t]here is no comparable authority for judicial creation of damages remedies," U.S. Br. 15 n.6, is belied by two centuries of practice. State and federal courts alike recognized judge-made damages actions against federal officers all the way back to the Founding—including, as in *Little v. Barreme*, 6 U.S. (2 Cranch) 170 (1804), for unlawful actions taking place outside the territorial jurisdiction of the United States. *See, e.g., Teal v. Felton*, 53 U.S. (12 How.) 284, 292 (1852) (rejecting argument that federal jurisdiction in damages suits against federal officers is exclusive). Whether the claims in these cases arose under common law, pre-*Erie* general law, or the Constitution, judges fashioned damages remedies in the absence of express statutory authorization. *See, e.g., Slocum v. Mayberry*, 15 U.S. (2 Wheat.) 1, 10, 12 (1817); *see also* Ann Woolhandler, *The Common Law Origins of Constitutionally Compelled Remedies*, 107 Yale L.J. 77, 87-90, 135-37 (1997).

Given this tradition, the federal government did not even argue in *Bivens* that courts lacked the authority to

recognize damages remedies for constitutional violations; it argued for an exercise of *state* judicial power in lieu of *federal* judicial power. *See* Br. for Resp. at 19-25, 35-38, *Bivens*, 403 U.S. 388 (1971) (No. 70-301), 1970 WL 116900. (Today, the FTCA takes such actions outside of state judicial power.) The government would now cast aside this deeply entrenched tradition of judge-made damages remedies against federal officers, leaving constitutional violations with no remedy at all.

B. Cherry-picking a handful of statutes, the government next purports to divine a pattern that demonstrates Congress's decision to preclude a judicial damages remedy for aliens injured abroad, which supposedly counsels against recognizing a *Bivens* action here. U.S. Br. 22-26. That argument fails at each step.

First, Congress is entitled to far greater latitude in defining the reach of statutory and common-law rights rather than constitutional rights. In the former context, the courts' job is simply to vindicate the meaning conveyed by the legislature—which may have good reasons, bad reasons, or no reasons whatsoever for limiting the geographic scope of particular claims. Thus, for example, the FTCA's "foreign country" exception "codified Congress's 'unwilling[ness] to subject the United States to liabilities depending upon the laws of a foreign power.'" *Sosa v. Alvarez-Machain*, 542 U.S. 692, 707 (2004) (quoting *United States v. Spelar*, 338 U.S. 217, 221 (1949)). Whatever the merits of that concern in the context of common-law tort claims, it has no bearing here—where any liability depends solely on the Constitution, as authoritatively interpreted by this Court. *See* Pet. Br. 43. Similarly, the government's nod to the general presumption against extraterritorial application of statutes is

inapt because that interpretive canon is grounded entirely in considerations not present here. *See* Pet. Br. 47-48.[3]

Second, the government's scattershot examples prove no pattern but its selection bias. The government argues that Congress has not "adopted a [] claims procedure for aliens injured abroad by the actions of U.S. Border Patrol agents" similar to what Congress created in the Foreign Claims Act and the International Agreement Claims Act for overseas actions of the State Department or noncombat activities of the military. U.S. Br. 22-24.[4] True enough, but it does not follow that Congress meant to preclude a damages action against border guards for unconstitutional uses of lethal force.

Looking beyond the government's select examples demonstrates that Congress has signaled an awareness that damages actions are available to foreign nationals injured abroad by federal officers. In section 1004(a) of the Detainee Treatment Act (DTA), Pub. L. No. 109-148,

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[3] The government maintains (at 27-28) that *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013), applied the presumption against extraterritoriality to non-statutory claims. But *Kiobel* involved claims arising under the law of nations, and its reasoning turned on a concern unique to the Alien Tort Statute—namely, that it could apply to foreign officials in their own country. *Id.* at 1664-65.

[4] The government also invokes (at 26) the Torture Victim Protection Act and 42 U.S.C. § 1983 to show that Congress did not want aliens injured abroad by U.S. officials to have damages remedies. But the TVPA expressly excludes *any* claim against a U.S. official, regardless of where it arises, *see* 28 U.S.C. § 1350 note, and it authorizes relief for both citizens and noncitizens injured by proper defendants overseas, *see Kiobel*, 133 S. Ct. at 1669 (Kennedy, J., concurring). Similarly, because section 1983 provides a cause of action only for violations of federal rights by *state* officers, it is of little relevance given the lack of examples in which state officers act under color of state law outside U.S. territory.

119 Stat. 2680, 2740 (2005), for example, Congress conferred immunity on federal officers from civil (and criminal) liability for "specific operational practices" arising from interrogations of noncitizen terrorism suspects. And Congress removed federal jurisdiction over any non-habeas claim "against the United States or its agents relating to any aspect of the detention by the Department of Defense of an alien at Guantanamo Bay, Cuba," by anyone then in military custody or previously determined to have been "properly detained as an enemy combatant." *Id.* § 1005(e)(1), 119 Stat. 2742. If, as the government argues, no damages remedy should have been available against the federal government or a federal officer in the first place, neither of these provisions should have been necessary.

That is not all. After this Court held in *Hamdan v. Rumsfeld*, 548 U.S. 557, 576-84 (2006), that section 1005(e)(1) of the Detainee Treatment Act did not apply to "pending cases," Congress reenacted a version of the DTA language in the Military Commissions Act of 2006, Pub. L. No. 109-366, § 7(a), 120 Stat. 2600, 2635-36 (codified at 28 U.S.C. § 2241(e)(2)), to preclude damages actions in pending cases. *See, e.g.*, *Janko v. Gates*, 741 F.3d 136 (D.C. Cir. 2014) (rejecting constitutional challenge predicated on MCA's foreclosure of *Bivens* remedy); *Al-Zahrani v. Rodriguez*, 669 F.3d 315 (D.C. Cir. 2012). On the government's theory, all this legislation was superfluous because none of these suits was viable anyway.[5]

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[5] The government dismisses the Westfall Act entirely "because it was enacted against a backdrop of decisions holding that *Bivens* does not extend to any new context in which Congress, rather than the judiciary, is the appropriate body to establish a damages remedy." U.S. Br. 17 n.7. Even if that were a fair reading of the Westfall

(continued ...)

A more complete consideration of the choices Congress has made in this field thus demonstrates no categorical hostility to damages suits against individual officers by foreign nationals.[6] Indeed, Congress's explicit decision to exclude constitutional claims against federal officers from the FTCA shows that it understood *Bivens* actions would remain available. Pet. Br. 42; *Carlson v. Green*, 446 U.S. 14, 20 (1980). Congress may have displaced damages remedies in specific contexts—as in the Detainee Treatment Act and Military Commissions Act—but its actions do not demonstrate a wholesale displacement of judicial damages remedies covering this case.

C. Finally, the government contends (at 18-22) that only Congress can authorize the claims in this case because "claims by aliens injured abroad implicate foreign relations and national security." But that argument relies on an overly narrow view of judicial competence and a different (and at this stage impermissible) view of the facts of this case.

1. The government alludes to the possibility that a damages suit for constitutional violations arising outside

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Act—and it isn't, *see* James E. Pfander & David Baltmanis, *Rethinking* Bivens*: Legitimacy and Constitutional Adjudication*, 98 Geo. L.J. 117, 132-38 (2009))—that assertion only raises, rather than settles, the question of whether the judiciary has a role in protecting constitutional rights where Congress has not.

[6] Moreover, the FCA, the IACA, and the FTCA also function as waivers of the federal government's sovereign immunity, and thus their scope "must be unequivocally expressed." *United States v. Nordic Village Inc.*, 503 U.S. 30, 33-34 (1992) (citations and internal quotation marks omitted). Damages suits against government officers in their personal capacity, in contrast, do not implicate sovereign immunity.

the United States "would inject the courts into sensitive matters of international diplomacy and risk ... 'embarrassment of our government abroad through multifarious pronouncements by various departments on one question.'" U.S. Br. 19 (quoting *Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 209 (D.C. Cir. 1985) (Scalia, J.)). That would, perhaps, be true in cases challenging some aspect of the government's foreign policy. In *Sanchez-Espinoza*, the petitioner lodged claims against "military and foreign policy officials" arising out of high-level policy decisions to support paramilitary operations against a foreign sovereign on its own territory. 770 F.2d at 208-09. Those concerns are not implicated in this case, which involves only the use of force by a law-enforcement officer in a manner that (taking the allegations as true) U.S. domestic and foreign policy already condemns. Failing to provide a remedy—rather than judicially recognizing one—has foreign-policy ramifications. *See* Pet. Br. 47.

The government further argues (at 21) that it would intrude on foreign affairs for courts to even *attempt* "to make a judgment about whether the provision of a damages remedy to an alien injured abroad would be consistent with U.S. foreign policy." The government cannot identify a single case endorsing this cramped view of the judicial role. And its argument would foreclose *Bivens* remedies in any case where the government simply *asserts* there is a potential impact on foreign policy. But it is not beyond the federal courts' competence to separate out disputes that actually *interfere* with U.S. foreign policy from those that merely *relate* to it. *Cf. Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 201 (2012) ("This is what courts do."). Federal courts routinely make judgments about implications for foreign policy, often at the *behest* of the federal government. *See, e.g.*, *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396 (2003) (dis-

placing state-law claims on the ground that they interfered with foreign policy).

The government's argument, moreover, would eliminate *Bivens* actions for excessive force inside our borders, which are routinely recognized against border agents and other federal law-enforcement officers. This Court has already recognized that failing to protect foreign nationals within our borders could cause international discord. In *Arizona v. United States*, 132 S. Ct. 2492, 2498-99 (2012), the Court explained that "[o]ne of the most important and delicate of all international relationships ... has to do with the protection of the just rights of a country's own nationals when those nationals are in another country." Rather than counseling judicial abstention, the diplomatic concerns led the Court to find a state law preempted. *See id.* The same concerns militate in favor of allowing a federal remedy for petitioners here.

2. The government's blanket invocation of "national security" as a special factor fares no better. To make its point that national security is at issue here, the government is forced to resort to allegations other than those in the complaint, which are the only facts currently before this Court at this stage. U.S. Br. 22.[7] It is true, of course, that *Bivens* suits "might ... be brought based upon military or intelligence activities," *id.* at 21, and that, in those contexts, there may well be special factors counseling hesitation. But the complaint in this case alleges that Agent Mesa was acting solely in a law-enforcement capacity at all relevant times—and that his actions were

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[7] The government asserts (at 22 n.10) that petitioners' argument depends upon a "contested depiction of the facts." At the motion-to-dismiss stage, however, it does not matter whether the allegations are "contested."

not consistent with (and, indeed, are specifically prohibited by) the regulations governing border agents. *See* Pet. Br. 46.

The government's sweeping contention (at 22) that "courts are not well-suited to distinguish between border-protection activities that do and do not implicate national security," applies equally to activities unrelated to the border that could in some hypothetical case implicate national security or foreign relations. The federal courts are not prohibited from rendering constitutional decisions that *might* have foreign policy or national security implications; they have the ability to identify which cases fall into the relevant category. Taking the allegations as true, judicial recognition of a damages remedy for the Hernández family leaves our national security and foreign policy undisturbed.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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